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AND
BRIEFS

No. 15-1363

Supreme Court, U.S.
FILED
NOV 18 2016
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IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

AHMER IQBAL ABBASI, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS DENNIS HASTY AND JAMES SHERMAN

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QUESTIONS PRESENTED

This putative class action was filed by foreign nationals who were illegally in the United States and detained following the September 11th terrorist attacks. The FBI designated respondents as "of interest" or "high interest" to its investigation into the attacks; Bureau of Prisons policy mandated that detainees so designated be housed in the most restrictive conditions permissible. Respondents brought this action seeking to hold petitioners Dennis Hasty and James Sherman, who were the Warden and Associate Warden at the Metropolitan Detention Center, personally liable in damages, along with others. Respondents claim that Hasty and Sherman should be liable because (*inter alia*) they concluded—and thus "knew"—that *the FBI* lacked evidence to support its terrorism designations for respondents. The questions presented are:

1. Whether, as the Second Circuit held, the judicially implied cause of action for damages against individual officials recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), extends to this context.

2. Whether qualified immunity was properly denied, notwithstanding the specific circumstances confronted by petitioners—including the FBI's terrorism designations for respondents—because the Constitution "clearly" prohibits any "condition of pretrial detention not reasonably related to a legitimate governmental objective," Pet. App. 58a, or imposed "because of * * * race, ethnicity, religion, and/or national origin," *id.* at 74a.

3. Whether the allegations against Hasty and Sherman—such as the assertion that they "knew" the FBI's terrorism designations for respondents were wrong but imposed otherwise mandatory confinement conditions because they had discriminatory intent—are sufficiently plausible to state a claim under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court and appellees-cross-appellants in the court of appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the district court and appellants in the court of appeals.

John Ashcroft, Robert Mueller, and James W. Ziglar were defendants in the district court and cross-appellees in the court of appeals.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court but did not participate in the appeals that are the subject of the proceedings before this Court.

Salvatore Lopresti,* Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but did not participate in the appeals that are the subject of the proceedings before this Court.

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* Mr. Lopresti filed a notice of appeal but did not pay a filing fee or file a brief. His appeal was accordingly dismissed under Federal Rule of Appellate Procedure 31(c).

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but did not participate in the appeals that are the subject of the proceedings before this Court.

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BRIEF FOR PETITIONERS HASTY AND SHERMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-163a) is published at 789 F.3d 218 (2d Cir. 2015).[1] The opinion of the district court (Pet. App. 164a-236a) is published at 915 F. Supp. 2d 314 (E.D.N.Y. 2013).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 17, 2015. Pet. App. 1a. It denied rehearing and rehearing en

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[1] Except where otherwise indicated, citations are to the petition appendix in No. 15-1359, *Ashcroft* v. *Abbasi*.

banc on December 11, 2015. *Id.* at 237a. Hasty and Sherman filed a petition for a writ of certiorari on May 6, 2016, and this Court granted the petition on October 11, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution and Title 42 of the U.S. Code are set forth at pages 241a-243a in the appendix to the petition in No. 15-1363, *Hasty* v. *Abbasi*.

STATEMENT

This putative class action was filed by foreign nationals who were illegally present in the United States and detained following the 9/11 terrorist attacks. Respondents seek to impose personal damages liability on various federal officials—from the Attorney General to local prison wardens—under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and for conspiracy under 42 U.S.C. § 1985(3).

I. Proceedings In District Court

"In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks." Pet. App. 7a. More than 4,000 FBI agents were dedicated to the investigation. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 667 (2009). Hundreds of foreign nationals illegally in the United States, including respondents, were detained on immigration charges. *Ibid.* Respondents were housed in the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Petitioners Hasty and Sherman were, re-

spectively, the Warden and Associate Warden for Custody at MDC.

A. Respondents' Claims for Damages

Filed in 2002, this action names as defendants former Attorney General John Ashcroft, former FBI Director Robert Mueller, former INS Commissioner James Ziglar (the "DOJ Defendants"), former MDC Warden Dennis Hasty, and former MDC Associate Warden for Custody James Sherman.

1. Following respondents' arrests, the FBI designated them as "of interest" or of "high interest" to the 9/11 investigation. Pet. App. 252a (¶ 1), 253a (¶ 4). Under Bureau of Prisons ("BOP") policy, detainees so classified had to be held under "'the most restrictive and secure conditions permitted.'" *Id.* at 50a-51a; see *Iqbal*, 556 U.S. at 667. Such detainees were also subject to a "hold-until-cleared" policy that precluded their release until the FBI cleared them of terrorism connections. Pet. App. 17a; see *id.* at 270a (¶ 55); J.A. 218-219, 240-242.

Consistent with those policies, respondents were confined in the "ADMAX SHU," a special wing of the MDC. See Pet. App. 10a; see also *id.* at 253a-254a (¶ 4). A total of 84 detainees were housed in that unit between September 14, 2001, and August 27, 2002. J.A. 49, 219. Respondents were detained for periods ranging from three to eight months. Pet. App. 2a.

2. The current allegations stem from the Fourth Amended Complaint ("Complaint"), filed after the Second Circuit remanded the case for reconsideration in light of *Ashcroft* v. *Iqbal*, *supra*. See *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009). The Complaint does not challenge the legality of respondents' detention; their detention on immigration charges was concededly lawful.

See Pet. App. 252a(¶¶1-2), 263a(¶33.b). Respondents challenge only the conditions of their confinement. The courts below separated those into two categories—"official" conditions required by policy, and "unofficial" conditions reflecting unauthorized treatment by individual prison guards. *Id.* at 49a, 199a.

The "official" conditions were severe: BOP policy required detainees designated as "of interest" (or higher) to the terrorism investigation to be housed in the "most restrictive * * * conditions permitted." Pet. App. 50a-51a. That involved "'place[ment] in tiny cells for over 23 hours a day'"; the lights were "left on in their cells for 24 hours a day"; and they were "'prohibited from moving around the unit, using the telephone freely, using the commissary, or accessing MDC handbooks.'" *Id.* at 10a.

Respondents did not claim those conditions would be impermissible for genuine terrorism suspects. Oral Arg. at 1:36:58, *Turkmen* v. *Hasty*, No. 13-981 (2d Cir. May 1, 2014); Pet. App. 46a (conceding the "challenged conditions" could be imposed on those "with suspected ties to terrorism"). Respondents agree that whether those conditions could lawfully be imposed on suspects with actual terrorism connections "is not relevant." Br. in Opp. 29 n.11.

Instead, respondents' suit alleges that it was unlawful to impose those conditions on *them* because the FBI terrorism designations were wrong. Respondents allege that, although the FBI had designated them "of interest" to its investigation, they in fact had no terrorism connections. Pet. App. 51a-52a; see *id.* at 277a(¶69), 278a-279a(¶73). Respondents assert that Hasty and Sherman violated clearly established law because they supposedly "knew" the FBI's designations were unfounded, but failed to disregard the designations by imposing less-restric-

tive conditions (in violation of BOP policy) based on their own putative views. See *id.* at 51a-54a.

With respect to "unofficial" conditions, respondents allege "physical and verbal abuse" by individual guards. See Pet. App. 11a. Respondents allege that some guards slammed them into walls, twisted their arms, wrists, and fingers, and otherwise roughly handled them. *Ibid.* Respondents also allege that MDC guards referred to them as terrorists, threatened them with violence, made humiliating sexual comments during strip searches, and insulted their religion. *Ibid.* Respondents allege that guards called them "camel[s]" and "fucking Muslims." *Ibid.* Respondents do not claim that Hasty or Sherman observed or engaged in such conduct themselves. See *id.* at 54a-57a.

The Complaint incorporated by reference two reports from the Office of the Inspector General concerning the treatment of aliens detained in connection with the 9/11 investigation. J.A. 48; see Pet. App. 253a(¶3 n.1), 254a(¶5 n.2). The reports are reproduced at J.A. 34-416.[2] Released in 2003, those reports reflected investigative fieldwork from as early as March 2002. J.A. 49. They noted that the FBI was responsible for designating detainees as "of interest" to its 9/11 investigation, *id.* at 102, and that the restrictive conditions were imposed on such detainees pursuant to BOP policy, *id.* at 220. Regarding the unofficial conditions, the Inspector General's "investi-

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[2] Respondents incorporated the OIG reports "except where contradicted by the allegations" of the Complaint. *E.g.*, Pet. App. 253a(¶3 n.1). Respondents have identified only one instance of "a possible conflict between the * * * Complaint and either OIG Report," see C.A. Reply Br. of Pls.-Appellees-Cross-Appellants, at 24 n.6—on an issue not pertinent here.

gation [did] not uncover[ ] any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it." *Id.* at 299 n.130.

3. The Complaint seeks damages under four theories. Counts 1, 2, and 6 assert *Bivens* claims. Count 1 alleges a due-process violation. The conditions of confinement, it asserts, had no legitimate objective and were therefore impermissibly punitive. Count 2 asserts an equal-protection violation, alleging respondents were held in restrictive conditions based on race, ethnicity, or national origin. Count 6 asserts that respondents were subject to unreasonable and punitive strip searches in violation of the Fourth and Fifth Amendments. Finally, Count 7 alleges that Hasty, Sherman, and the DOJ Defendants violated 42 U.S.C. §1985(3) by conspiring to violate respondents' equal-protection rights.[3]

B. The District Court's Ruling

The district court granted the DOJ Defendants' motions to dismiss, and denied Hasty's and Sherman's motions in relevant part. See Pet. App. 183a-236a.

1. The district court recognized that, since implying a damages action for constitutional violations in *Bivens*, 403 U.S. 388, this Court has extended that action to new contexts only twice, refusing every requested extension for the past three decades. Pet. App. 221a-222a. *Bivens*, the district court observed, will not be extended if "special factors" counsel hesitation. *Id.* at 222a. Special factors include "'military concerns,'" "'national security

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[3] Counts 3-5 were dismissed below, Pet. App. 19a-20a, 27a-29a, 203a-220a, and respondents have not sought further review.

concerns,'" and "'foreign policy considerations.'" *Id.* at 226a.

The district court recognized that this case involves an "extraordinary factual context." *Turkmen* v. *Ashcroft*, No. 02-cv-2307, 2006 WL 1662663, at *30 (E.D.N.Y. June 14, 2006). But it ruled that there was no reason to examine whether "special factors" counsel hesitation because respondents were not seeking to "extend" *Bivens* to a "new context." Courts, it asserted, had previously allowed prisoners to assert conditions-of-confinement, equal-protection, and Fourth Amendment claims under *Bivens*. See Pet. App. 192a-193a n.10, 203a n.15, 232a.

2. The district court also ruled that the Complaint satisfies the pleading standard of *Iqbal*, 556 U.S. 662. *Iqbal* requires the Complaint to "plausibly" plead "an entitlement to relief" and address "obvious alternative" explanations for the challenged conduct. *Id.* at 679, 682.

For the due-process claims based on "official" conditions (Counts 1 and 6), the court held that "punitive intent" could be inferred from the conditions themselves. Pet. App. 200a-201a.[4] Regarding unofficial conditions, the court saw no indication that Hasty or Sherman had mistreated prisoners or observed such abuse. But it found respondents' allegations of deliberate indifference sufficient. *Id.* at 201a-202a.

The district court also sustained the equal-protection claim (Count 2). It credited the allegation that Hasty and Sherman concluded that "the FBI had not developed any information" tying respondents to terrorism. Pet. App.

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[4] The court addressed the due-process challenge to strip searches in Count 6 together with the official-conditions challenge in Count 1. Pet. App. 231a n.30.

210a. From that, the court held, one could infer Hasty and Sherman imposed restrictive conditions based on race or religion.

The district court also upheld respondents' Fourth Amendment challenge to strip searches (Count 6), finding that the Complaint sufficiently alleged that those searches lacked "legitimate penological purpose." Pet. App. 232a-233a. Finally, the court held that respondents adequately pleaded a conspiracy under § 1985(3) because Hasty and Sherman had agreed to "implement[ ] the facially discriminatory harsh confinement policy" required by BOP. *Id.* at 234a-235a.

3. The district court denied qualified immunity. On the due-process conditions-of-confinement claims, the court found it clearly established in 2001 that pretrial detainees could not be subject to "punitive conditions of confinement." Pet. App. 202a-203a. It reached a similar conclusion on the equal-protection claim: "[E]xpressly singling out Arabs and Muslims for harsh conditions of confinement" violated clearly established law. *Id.* at 210a-211a. As for the Fourth Amendment strip-search claim, the court ruled that "clearly established" law proscribed searches that are "not reasonably related to a legitimate penological purpose." *Id.* at 233a. On the § 1985(3) claim, the court acknowledged that "it may not have been clearly established in 2001" that § 1985(3) reached conspiracies by federal officers. *Id.* at 235a. But it denied immunity because no official could believe it "'legally permissible'" to join a conspiracy to discriminate. *Ibid.*

4. The district court dismissed the claims against the DOJ Defendants, holding that the Complaint did not meet *Iqbal*'s requirements. Pet. App. 166a.

II. Proceedings In The Second Circuit

A. The Panel Decision

A divided panel affirmed in relevant part with respect to Hasty and Sherman, and reversed dismissal of the DOJ Defendants.

1. The panel majority did not dispute that, for more than three decades, this Court has refused to extend *Bivens* to any new contexts. The majority likewise agreed that "context" encompasses more than the identity of the constitutional right allegedly violated. But the majority ruled that the context here was not "new," and thus required no inquiry into whether special factors counsel hesitation. See Pet. App. 24a-25a.

When deciding whether a context is "new," the majority declared, courts should consider only (a) the "rights injured" and (b) the "mechanism of injury." Pet. App. 23a. The "rights injured" here, it stated, were "substantive due process and equal protection," and the "mechanism of injury" was "punitive conditions without sufficient cause." *Id.* at 24a-25a. Thus, the context of respondents' *Bivens* claims was "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Id.* at 24a.

The majority thus declined to consider whether national security, foreign relations, or other issues concerning the detention of foreign nationals following a terrorist attack presented "special factors" counselling hesitation. It did not consider whether special factors counsel hesitation before extending *Bivens* to claims that local jailers should have ignored *FBI* terrorism designations based on their own putative conclusions about the detainees' connections to an FBI terrorism investigation. And it did not ask "who should decide whether [to provide] such a

remedy" in this context, Congress or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). Instead, the panel majority held that, because ordinary prisoners had been permitted to bring conditions-of-confinement claims in ordinary contexts, respondents could bring conditions-of-confinement claims here. Pet. App. 24a n.15.

2. The majority then held that the Complaint plausibly pleaded violations of clearly established rights consistent with *Iqbal* and qualified-immunity principles.

Due-process claims. With respect to the official conditions of confinement, the majority acknowledged that the conditions would be lawful for "individuals with suspected ties to terrorism." Pet. App. 46a. It did not dispute that BOP policy obligated Hasty and Sherman to impose those conditions on detainees designated by the FBI as "of interest" to the 9/11 investigation, including respondents. *Id.* at 50a-51a. And the majority admitted that Hasty and Sherman's "responsibility to carry out" BOP's directive "would not sustain liability." *Id.* at 51a.

The majority nonetheless held that the Complaint met *Iqbal*'s plausibility requirement. It found the Complaint plausibly alleged that, although Hasty and Sherman may have "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "eventually knew that the FBI lacked any individualized suspicion for many" detainees but imposed restrictive conditions nonetheless. Pet. App. 52a. Hasty and Sherman allegedly received "regular written updates" describing why each detainee was arrested and "'the danger he might pose'" to the prison. *Ibid.* Because those updates did not link respondents to terrorism, the majority stated, the Complaint plausibly alleged that Hasty and Sherman "knew" the FBI's "of interest" designations were unfounded. *Id.* at 51a-54a. As a re-

sult, the official conditions "were 'not reasonably related to a legitimate goal,'" and it was plausible to infer they were imposed "with punitive intent." *Id.* at 50a.

The majority denied qualified immunity. At the time Hasty and Sherman acted, the majority stated, it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates detainees' "constitutional rights." Pet. App. 58a. The majority did not address whether clearly established law required Hasty and Sherman to disregard FBI terrorism designations if they believed them erroneous.

With respect to the unauthorized abuse by MDC guards, the majority held that the claims met *Iqbal*'s plausibility requirement for Hasty but not Sherman. Pet. App. 56a-57a. The court invoked allegations that "Hasty avoided evidence of detainee abuse by 'neglecting to make rounds on the ADMAX [SHU].'" *Id.* at 56a. And it listed general allegations that Hasty became aware of abuse and "encouraged" harsh treatment by "referring to" detainees "as terrorists." *Id.* at 57a.

Equal-protection claims. On the equal-protection claims, the panel abandoned the district court's reasoning. Pet. App. 68a. Instead, it seized on allegations that Hasty and Sherman had approved a document—of unspecified date, purpose, and origin—allegedly stating that "'executive staff at the MDC had classified'" suspected terrorists "as 'High Security' based on * * * 'individualized assessment[s].'" *Ibid.* (quoting Pet. App. 279a(¶74)). That assertion was false, the panel stated, because Hasty and Sherman conducted no assessments. *Id.* at 68a-69a. Based on those "allegations of duplicity regarding the basis for confining the 9/11 detainees," the

majority found it "reasonable to infer * * * discriminatory intent." *Id.* at 69a.

The majority did not address the alternative explanation—that Hasty and Sherman were following a BOP policy that required the conditions of confinement for individuals the FBI designated "of interest" to its terrorism investigation. Nor did the majority address the possibility that the cited memorandum meant that *the FBI* had made the classifications.

The majority denied qualified immunity, holding that it "was clearly established * * * that it was illegal to * * * target [respondents] for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. The majority did not ask whether clearly established law required prison officials to disregard FBI terrorism designations.

Fourth Amendment claims. The majority upheld the Fourth Amendment strip-search allegations. Pet. App. 75a-80a. It concluded that respondents had sufficiently alleged that "Hasty and Sherman were personally involved in creating and executing" a strip-search policy. *Id.* at 77a. That policy, the panel held, "was not reasonably related to legitimate penological interests," because it required searches "when there was no possibility that [respondents] could have obtained contraband." *Ibid.*

Section 1985(3). Finally, the court addressed the allegation that Hasty and Sherman violated § 1985(3) by conspiring with DOJ officials to violate respondents' equal-protection rights. The majority acknowledged that, under the intra-enterprise conspiracy doctrine, members of a single entity like the DOJ cannot conspire for purposes of § 1985(3). Pet. App. 82a. And it agreed that BOP is part of the DOJ. See *id.* at 83a n.46. But it refused to de-

cide whether BOP and DOJ comprise one entity, remanding that issue to the district court. *Id.* at 83a.

The majority again denied qualified immunity. It did not dispute that there was uncertainty over whether § 1985(3) covered the alleged conspiracy given the intra-enterprise conspiracy doctrine. Pet. App. 83a & n.46. Nor did it deny that, at the time of these events, it was not clear that § 1985(3) extended to federal officers. *Id.* at 83a; see *Iqbal* v. *Hasty*, 490 F.3d 143, 177 (2d Cir. 2007), rev'd *sub nom. Ashcroft* v. *Iqbal*, 550 U.S. 662 (2009). But the majority held that federal officials could not reasonably believe it permissible to conspire to violate equal-protection rights. Pet. App. 83a-84a.

3. On respondents' cross-appeal, the majority reversed dismissal of the DOJ Defendants. Pet. App. 30a-49a, 61a-68a, 74a-75a.

B. Judge Raggi's Dissent

Judge Raggi issued a lengthy dissent. Pet. App. 86a-163a.

1. Judge Raggi observed that, for decades, this Court has refused to extend *Bivens* to any new context. Pet. App. 90a-92a. This Court's "reluctance to extend *Bivens* is grounded in our constitutional structure of separated powers." *Id.* at 91a. Proper analysis "focuses not on 'the merits of the particular remedy sought,' but on '*who should decide* whether such a remedy should be provided'"—Congress, or the judiciary. *Ibid.* (emphasis added). Here, Congress must decide whether to extend *Bivens* to this new context. *Id.* at 92a-118a.

Judge Raggi observed that, by finding this was not a "new context," the majority had avoided examining whether special factors counseled against *Bivens*' expansion. Pet. App. 93a-94a. And she objected to the major-

ity's "new standard" for determining whether a context is "new." *Id.* at 92a. "[C]ontext," Judge Raggi urged, could not be reduced to "general identification of a constitutional right or a mechanism of injury." *Id.* at 94a. Rather, special-factors analysis "demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented." *Ibid.* "[W]here a proposed *Bivens* claim presents legal and factual circumstances that were *not* present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in *that* context." *Ibid.* "No court," Judge Raggi concluded, "has ever made the judgment that an implied damages remedy is the best way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority." *Id.* at 94a-95a.

Judge Raggi found this case replete with special factors counselling hesitation. Pet. App. 101a. Respondents challenge "official executive policy," and a "*Bivens* action has never been considered a 'proper vehicle for altering an entity's policy.'" *Id.* at 102a; see *id.* at 102a-105a. Respondents' claims involved the "executive's immigration authority," a matter "'largely immune from judicial inquiry or interference.'" *Id.* at 106a-107a. And respondents' claims carried national-security implications. *Id.* at 107a-114a. Such matters, Judge Raggi urged, "'are rarely proper subjects for judicial intervention' in the absence of congressional authorization." *Id.* at 108a.

2. Judge Raggi disagreed with the majority's holding that the Complaint satisfied *Iqbal*'s pleading requirements. The allegations, she explained, were insufficient to support a plausible inference that Hasty and Sherman imposed the restrictive conditions without penological justification. The "obvious and more likely motivation" for imposing restrictive conditions on respondents was "national and prison security" concerns based on the FBI's "of interest" designations. Pet. App. 146a. Judge Raggi likewise would have granted immunity with respect to the official conditions of confinement because they did not violate clearly established law. *Id.* at 147a-148a & n.41.

Turning to equal protection, Judge Raggi found respondents' allegations materially indistinguishable from the allegations this Court rejected in *Iqbal*. Pet. App. 150a-152a. She again noted that the Complaint failed to address the "'obvious'" and "'more likely'" explanation for Hasty's and Sherman's conduct: Respondents "were restrictively confined pending FBI-CIA clearance for the legitimate purpose of ensuring national security." *Id.* at 157a. "[N]o clearly established law would have alerted every reasonable officer that it violated equal protection to confine these lawfully arrested illegal aliens pending clearance." *Id.* at 157a-158a. Because the Complaint did not state a plausible equal-protection violation, it likewise did not allege an actionable conspiracy to violate equal-protection rights in violation of §1985(3). *Id.* at 158a n.46.

Finally, Judge Raggi would have rejected respondents' Fourth Amendment claims. The Complaint failed to allege facts showing the challenged strip-search policy lacked a rational relationship to a legitimate government interest—"specifically, prison security." Pet. App. 159a-

160a. Given documented prison violence by terrorism suspects, "it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another." *Id.* at 161a.

C. The Six-Judge Dissent from Denial of Rehearing En Banc

The Second Circuit denied rehearing en banc, with six judges dissenting. The dissenters observed that this case made the Second Circuit the first court of appeals to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 240a. The dissenters deemed it obvious that the context was "new" and involved sensitive matters—like immigration and national security—that rendered *Bivens*' expansion inappropriate. *Id.* at 243a-246a. And the panel majority had "avoid[ed] its obligation" to consider whether special factors counselled hesitation before extending *Bivens* to these "unprecedented legal and factual circumstances." *Id.* at 243a.

The dissenters disagreed with the panel's qualified-immunity analysis. Qualified immunity must be granted unless the rights asserted "were so clearly established with respect to the '*particular* conduct' and the '*specific* context' at issue that every reasonable official would have understood that his conduct was unlawful." Pet. App. 246a (second emphasis added). The panel cited no case providing such clarity regarding the particular conduct and specific context here. *Id.* at 247a.

Finally, the dissenters urged that the panel's decision diluted *Iqbal*'s requirement that plaintiffs "plead a plausible claim grounded in a factual basis." Pet. App. 248a. The panel, the dissenters urged, sustained the Complaint

based on "hypothesized possibilities" and "conclusory assumptions or insinuations." *Ibid.*

SUMMARY OF ARGUMENT

I. The judicially implied private right of action for damages against federal officers, first recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), should not be extended to this new, and extraordinary, context.

A. This Court has cautioned that *Bivens* should not be extended to a new context where "special factors counsel hesitation"—where circumstances suggest that Congress, rather than the courts, should decide whether a damages action is appropriate. For more than three decades, this Court itself has refused to extend *Bivens* "to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001).

B.-C. The panel majority never considered whether special factors counselled hesitation before allowing the *Bivens* claims to proceed here. In the panel's view, it was not required to analyze special factors because the context of this case was not "new." It thus did not matter that this case arises from the Executive's response to an unprecedented terrorist attack and the detention of foreign nationals illegally in the United States. Nor did it matter that respondents seek damages from local jailers for failing to disregard *FBI* terrorism designations, and corresponding BOP confinement policies, based on their own putative terrorism assessments. Instead, evaluating the claims at a high level of generality, the panel held that this context was no different from a garden-variety conditions-of-confinement claim by ordinary prisoners in ordinary times. The panel's "new context" analysis defies precedent and common sense.

It also ignores all the differences between this context and ordinary prison-condition cases that give rise to special factors that should preclude *Bivens*' extension. For example, the claim that FBI terrorism designations were incorrect, and jailers should have second-guessed and ignored them, implicates matters related to national security, potentially sensitive intelligence information, and immigration policy, all of which are special factors that should foreclose a *Bivens* action. It also implicates grave concerns for the functioning of the Nation's law enforcement chain of command, particularly in times of national emergency. If there is to be a damages remedy in this context, Congress rather than the courts must provide it and define its boundaries.

II. Hasty and Sherman are entitled to qualified immunity. To overcome qualified immunity, a plaintiff must show that the challenged conduct violated "clearly established" rights—that no reasonable officer could have thought the challenged conduct lawful in the circumstances he confronted.

A. Respondents' due-process and equal-protection claims are predicated on Hasty and Sherman's failure to disregard FBI terrorism designations, and a facially valid BOP policy, by imposing less restrictive conditions based on their own subjective assessment of respondents' terrorism connections. But no clearly established law required such action. The panel reached a contrary conclusion only by analyzing the rights at issue at an impermissibly high level of generality that ignored the specific context Hasty and Sherman confronted.

B. The panel denied immunity on the Fourth Amendment strip-search claims because, under clearly established law, such searches must be rationally related to legitimate government purposes. The panel ruled that

the searches did not meet that standard because they allegedly occurred when "'there was no possibility that [respondents] could have obtained * * * contraband.'" Pet. App. 78a. But a reasonably competent officer could have thought the strip searches—which occurred when respondents were transported to and from meetings and in and out of their cells—were related to the legitimate interest in prison security. Just two years earlier, a terrorism detainee had severely injured a guard—causing permanent brain damage—by attacking him with a knife fashioned from a contraband comb.

C. Hasty and Sherman are also entitled to immunity on respondents' § 1985(3) claim. Apart from respondents' failure to establish the violation of clearly established equal-protection rights, it was not clearly established in 2001 that § 1985(3) even applied to federal officers. Nor was it clearly established that coordinated action by employees within the Justice Department—of which BOP is a part—could constitute a prohibited "conspiracy" within the meaning of § 1985(3).

III. Finally, the Complaint does not "'state a claim to relief that is *plausible* on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 668 (2009) (emphasis added).

A. Respondents' due-process and equal-protection claims based on "official" conditions fall far short. The Complaint fails to dispel the "obvious alternative" and "more likely" lawful explanation for Hasty and Sherman's decision to impose restrictive conditions of confinement: They were complying with the FBI's terrorism designations and BOP policies. That respect for coordinate agencies with expertise and a binding prison-security policy—not discriminatory motive or arbitrary treatment—is the single most plausible explanation.

B. The strip-search claims fail because they do not plausibly allege Hasty's and Sherman's personal involvement in creating and implementing the supposed policy. (Indeed, the panel had to infer that the unwritten policy even existed.) The Complaint contains no factual allegations making it plausible that Hasty and Sherman reviewed and approved that unwritten policy or that they were aware that it would result in irrational strip searches.

C. The panel dismissed the allegations about "unofficial" conditions—*i.e.*, unauthorized misconduct by individual prison guards—against Sherman, recognizing that they failed to show his personal knowledge and involvement; respondents have not sought further review. But there is no allegation that Hasty personally participated in or even witnessed the alleged abuses either. The panel's perfunctory recitation of a handful of allegations in the Complaint—ignoring all the more obvious explanations—was insufficient to establish the requisite personal involvement.

ARGUMENT

The panel decision in this case improperly extends *Bivens* to a new context, subjecting local jailers to personal liability for failing to countermand FBI terrorism designations based on their own putative views. It denied qualified immunity by invoking precisely the sort of analysis this Court has repeatedly condemned. And its approach to "plausibility" under *Iqbal* cannot be reconciled with the standards that case sets forth.

I. The Court Of Appeals Improperly Extended The Judicially Implied *Bivens* Action To A New Context

For more than three decades, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). The decision below nonetheless extends *Bivens* to a new context for which it is ill-suited—"actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 240a. Foreign nationals, it held, may pursue *Bivens* claims for damages against *local jailers* on the theory that they should have disregarded the *FBI*'s terrorism designations and BOP-mandated detention policies in favor of their own putative assessments of the detainees' ties to terrorism. The panel majority extended *Bivens* only by improperly refusing to consider "special factors" that would preclude *Bivens*' expansion, asserting that the context here was not "new." If foreign nationals are to be afforded a damages action allowing them to litigate the validity of FBI terrorism designations—and to impose personal liability on local jailers—Congress, not the courts, must decide to create it.

A. This Court Is Properly Reluctant To Extend *Bivens* in View of "Special Factors"

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Malesko*, 534 U.S. at 66. The plaintiff in *Bivens* alleged that federal agents had conducted a warrantless search and arrested him in violation of the Fourth Amendment. 403 U.S. at 389. The Court implied a damages action against the officers under the Fourth Amend-

ment. *Id.* at 397. This Court, however, has repeatedly cautioned that, "[b]efore a *Bivens* remedy may be fashioned" for a new context, "a court must take into account any 'special factors counselling hesitation'" in the absence of affirmative action by Congress. *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983).

1. In the decade following *Bivens*' judicial creation of an "implied private action for damages" under the Fourth Amendment, this Court extended that cause of action twice. It recognized a *Bivens* action for unconstitutional discrimination by a U.S. Congressman, *Davis* v. *Passman*, 442 U.S. 228 (1979), and one for Eighth Amendment violations by prison guards in the ordinary prison context, *Carlson* v. *Green*, 446 U.S. 14 (1980).

The Court has not extended *Bivens* in the three-and-a-half decades since. The Court declined to extend *Bivens* to "claims of First Amendment violations by federal employers, *Bush* v. *Lucas*, 462 U.S. 367 (1983), harm to military personnel through activity incident to service, *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and wrongful denials of Social Security disability benefits, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). And it has "seen no case for extending *Bivens* to claims against federal agencies, *FDIC* v. *Meyer*, 510 U.S. 471 (1994), or against private prisons, [*Malesko*, 534 U.S. at 61]." *Wilkie*, 551 U.S. at 550.

That reluctance to extend *Bivens* is well-founded. This Court has "repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). "'Congress is in a better position to decide whether or not the public interest would be served'" by imposing a "'new substan-

tive legal liability.'" *Schweiker*, 487 U.S. at 412, 426-427. "[I]mplied causes of action" are "disfavored." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009). This Court thus has admonished that courts must "'pay[] particular heed'" not to expand *Bivens* to new contexts if "'special factors counsel[] hesitation.'" *Wilkie*, 551 U.S. at 550.

2. The special-factors inquiry turns not on "*the merits* of the particular remedy," but on "*who should decide* whether [to provide] such a remedy"—Congress or the courts. *Bush*, 462 U.S. at 380 (emphasis added). For example, courts will not imply a *Bivens* action touching on "military, national security, or intelligence" matters. *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). In those areas, Congress's and the Executive's competence to balance competing objectives is at its apogee, while the judiciary's is at its nadir. *Ibid.*; see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to * * * national security are rarely proper subjects for judicial intervention.").

In *Davis*, this Court implied a *Bivens* remedy for a former congressional staffer claiming gender discrimination in violation of the Fifth Amendment. 442 U.S. at 230-231, 248-249. Four years later, in *Chappell*, the Court refused to extend *Bivens* to claims by Navy sailors who likewise alleged employment discrimination. 462 U.S. at 304. The Court did not deem the two contexts identical in view of the identity of the legal claims. Instead, it looked to an additional consideration not present in *Davis*—the military context—and concluded that it counseled a different result. *Id.* at 300-301, 304. When such "special factors" are present, Congress is "'in a far better position than a court to evaluate the impact of a new species of litigation,'" and courts thus will not imply

a new damages remedy. *Lebron* v. *Rumsfeld*, 670 F.3d 540, 553 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012).

While this Court has cautioned against extending *Bivens* to "new contexts," it has not articulated a test for determining whether a "context" is "new." The courts of appeals, however, have generally adopted a common-sense approach, "construe[ing] 'context' * * * 'to reflect a potentially recurring scenario that has similar legal and factual components.'" *Meshal* v. *Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)); see *De La Paz* v. *Coy*, 786 F.3d 367, 372 (5th Cir. 2015); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2011), cert. denied, 133 S. Ct. 2336 (2013).

That approach functions reasonably so long as courts, in comparing "legal and factual" scenarios, consider differences between the current case and prior ones that may give rise to "special factors counselling hesitation." As Judge Raggi explained, "where a proposed *Bivens* claim presents legal and factual circumstances that were *not* present in an earlier *Bivens* case, a new assessment" of whether special factors counsel hesitation "is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in *that* context." Pet. App. 94a (quoting *Wilkie*, 551 U.S. at 550).

B. The Second Circuit's "New Context" Analysis Eviscerates Special-Factors Review

This case arises from a national-security response to the 9/11 terrorist attacks. Respondents are foreign nationals, illegally in the United States, who were detained as part of the investigation into that attack. Because the FBI designated them as "of interest" or of "high inter-

est" to its investigation, *e.g.*, Pet. App. 302a(¶143), BOP policy required that respondents be confined in the "most restrictive and secure conditions permitted," *id.* at 50a-51a. Respondents do not challenge the legality of that policy itself. Rather, they claim that the imposition of restrictive confinement conditions on *them* violated due process and equal protection. Respondents allege that, while Hasty and Sherman may have "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "*eventually* knew that the FBI lacked any individualized suspicion for many" detainees held in restrictive confinement, *id.* at 52a (second emphasis added), yet "continued to detain them" in those conditions, *id.* at 53a. Essentially, respondents seek to hold *local jailers* liable under *Bivens* because they failed to reject *FBI terrorism designations*, and did not disregard the corresponding confinement conditions mandated by *BOP policy*, based on their own putative views about respondents' ties to terrorism.

1. The panel majority refused to consider whether "special factors" counselled against extension of the *Bivens* action to this context. The majority declined to consider that this case arises from a national-security response to an unprecedented terrorist attack. It did not address whether special factors might exist here because the case implicates FBI terrorism designations—or that the claims rest on the theory that local jailers were obligated to disregard them. It did not consider whether permitting a case like this to proceed might touch on issues of national security, require inquiry into intelligence information, or affect foreign relations. Nor did it ask "who should decide whether [to provide] such a remedy" in this context, Congress or the courts. *Bush*, 462 U.S. at 380.

Instead, the panel held that the context was not "new"—that the case "stands firmly within a familiar *Bivens* context." Pet. App. 25a. But it reached that result only by adopting a highly generalized test for determining whether a *Bivens* context is "new." A context is not "new," the majority held, if (a) the "rights injured" and (b) the "mechanism of injury" match those in prior *Bivens* actions. *Id.* at 23a. Applying that test, the panel identified the injured rights as "substantive due process," "equal protection," and "Fourth Amendment" rights. *Id.* at 24a, 28a-29a. And it identified the "mechanism of injury" as "punitive conditions without sufficient cause" and "an unreasonable search performed by a prison official." *Id.* at 24a-25a, 28a.

The panel majority thus defined the "context" here as "federal detainee[s] * * * alleg[ing] that individual federal officers subjected them to punitive conditions" or "subjected them to unreasonable searches." Pet. App. 24a, 28a. At that level of abstraction, the panel found no difference between a run-of-the-mill prisoner suit alleging "punitive conditions" or "unreasonable searches" and the extraordinary context here—the claim that jailers should be liable for deferring to the FBI's terrorism designations for detained foreign nationals in the wake of 9/11.

That approach utterly decontextualizes "context." "At a sufficiently high level of generality," any case can be analogized to another. *Arar*, 585 F.3d at 572. The approach also divorces the "context" inquiry from its purpose. The point is to determine whether courts have *already* conducted a "special factors" analysis addressing the same considerations, rendering a new analysis unnecessary. See Pet. App. 94a (Raggi, J., dissenting). Courts may have allowed *Bivens* suits by "federal detainee[s]" based on garden-variety allegations that "federal officers

subjected them to punitive conditions." *Id.* at 24a-25a, 28a-29a. But that does not mean courts have considered whether "special factors" counsel against judicial implication of a *Bivens* action for claims touching on national security, or seeking to impose personal liability on jailers for respecting FBI terrorism designations.

The cases cited by the panel majority illustrate the problem. For example, the panel cited *Cale* v. *Johnson*, 861 F.2d 943 (6th Cir. 1988), as holding that "'a *Bivens* action may be brought by a federal prisoner, alleging violations of his right to substantive due process.'" Pet. App. 26a. But *Cale* concerned allegations that a prison official had "plant[ed] illegal drugs" on an inmate for "retaliatory purposes." 861 F.2d at 948. Other cited cases involved familiar allegations of deliberate indifference to medical needs—from guards "delay[ing] for too long" in transferring prisoners to a hospital, *Carlson*, 446 U.S. at 16 n.1, to denying a prisoner "access to his glaucoma medication," *Thomas* v. *Ashcroft*, 470 F.3d 491, 494 (2d Cir. 2006).

That special factors did not counsel hesitation in those contexts says nothing about whether special factors counsel hesitation here—where detained foreign nationals unlawfully present in the United States following terrorist attacks seek to hold local jailers liable for not disregarding the FBI's terrorism designations and the BOP's corresponding mandatory confinement conditions. If this Court's admonition that courts must consider special factors before extending *Bivens* to new "contexts" means anything, courts cannot equate the unprecedented context here with an ordinary conditions-of-confinement challenge by ordinary inmates in ordinary times.

2. The Second Circuit's "new context" framework defies this Court's precedents. As noted above, *Davis*

implied a *Bivens* remedy to permit a former congressional staffer to assert gender discrimination. 442 U.S. at 230-231, 248-249. But *Chappell* foreclosed a similar claim by Navy sailors. 462 U.S. at 297, 304. Under the Second Circuit's "source of right"/"mechanism of injury" formulation, *Chappell* would not have been a new "context." In both *Chappell* and *Passman*, the source of the right (Fifth Amendment) and the mechanism of injury (discriminatory employment actions) were the same. But this Court recognized that *Chappell* arose within "the framework of the military establishment," an area where Congress and not the courts has particular authority and expertise. 462 U.S. at 301-303. It thus presented a new context where special factors precluded *Bivens*' expansion.[5]

Likewise, although this Court implied an Eighth Amendment remedy against federal prison officials in *Carlson*, 446 U.S. at 17, it refused to extend that remedy to suits against private corporations operating a prison under a BOP contract in *Malesko*, 534 U.S. at 63. The legal and factual differences between publicly employed corrections officers and private corporations, the Court ruled, counseled against *Bivens*' expansion. See *id.* at 70-74.

The Second Circuit's "new context" framework thus defies precedent and common sense. By treating cases

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[5] The Second Circuit characterized *Chappell* as "focus[ing] on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." Pet. App. 24a n.15. But the Second Circuit ignored the similarly special nature of any "mechanism of injury" here, disregarding national-security concerns and the different roles of the FBI and local jailers in identifying terrorist threats. See *id.* at 24a, 28a.

with different legal and factual circumstances as the same "context," it evades analysis of considerations critical to whether "special factors" counsel against judicial implication of a remedy Congress has not authorized. A "new context" test that does not acknowledge the differences between a run-of-the-mill conditions-of-confinement case by an ordinary prisoner and the exceptional circumstances at issue here is no test at all. Such an approach "invite[s]" *Bivens'* expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561.

C. This Case Is Replete with Special Factors

This action arises from a national-security response to the most devastating terrorist attack "'in the history of the American Republic.'" *Iqbal*, 556 U.S. at 685. "[T]he executive's exercise of national security authority * * * will be *the* critical focus" of the case. Pet. App. 108a. Special factors thus resonate throughout this context.

1. "Matters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292. Consequently, where the allegations involve "the military, national security, or intelligence," special factors counsel against extending *Bivens*. *Doe*, 683 F.3d at 394; see also *Meshal*, 804 F.3d at 425-426.

For example, in *Lebron*, the Fourth Circuit refused to extend *Bivens* to claims against Department of Defense officials arising from a citizen's seizure and detention as an enemy combatant. Special factors counseled hesitation because a *Bivens* remedy would "'intrude upon the authority of the Executive in military and national security affairs.'" 670 F.3d at 549. Likewise, in *Doe*, the D.C. Circuit declined to extend *Bivens* to a case that "would require a court to delve into the military's policies re-

garding the designation of detainees as * * * 'enemy combatants,' as well as policies governing interrogation techniques." 683 F.3d at 394, 396.

Those same considerations apply here. This case would require courts to second-guess FBI terrorism designations for foreign nationals and decide appropriate conditions of confinement. Whether the judiciary should be placed in the position of "review[ing] and disapprov[ing] sensitive * * * decisions" of that sort is a decision "'more appropriate[ ] for those who write the laws'" than "'for those who interpret them.'" *Lebron*, 670 F.3d at 551-552. That is so not only because constitutional authority to create causes of action rests with the political branches, "but also because that's where the expertise lies." *Vance* v. *Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

2. Unlike typical prison cases, moreover, cases like this one often involve classified or sensitive information. The propriety of FBI terrorism designations, and the assertion that Hasty and Sherman "knew" the FBI was wrong, are linchpins of respondents' claims. Litigating the merits thus could "require judicial intrusion into matters of national security and sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009). "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. 159, 175 (1985).

That consideration has special force where, as here, the plaintiffs are foreign nationals. See *Arar*, 585 F.3d at 576. The FBI's assessment of terrorism connections in such cases may rest on "exchanges among the ministries and agencies of foreign countries on diplomatic, security,

and intelligence issues." *Ibid.* "Even the probing of these matters" may deter foreign nations from "sharing intelligence resources to counter terrorism." *Ibid.*; see *Lebron*, 670 F.3d at 554. Because the legislature is better equipped to evaluate those risks, the potential involvement of sensitive information likewise weighs dispositively against *Bivens*' expansion. *Lebron*, 670 F.3d at 554.

Respondents' effort to deny that risk proves the opposite. Respondents note that, according to the Complaint, "there was no reason to suspect [respondents] of any connection to terrorism," and Hasty and Sherman knew it. Br. in Opp. 20. On a motion to dismiss, they assert, those allegations must be taken as true. *Id.* at 19-20. But respondents will have the burden of proving that the FBI had no intelligence information tying them to terrorism, and defendants may wish to prove the opposite. Litigating such issues threatens to "require judicial intrusion into matters of national security and sensitive intelligence information." *Libby*, 535 F.3d at 710. Even uncertainty over the need to consider sensitive information at any point in the litigation "is reason for caution" before extending *Bivens*. *Meshal*, 804 F.3d at 426; see *Lebron*, 670 F.3d at 553 (special factors preclude *Bivens*' extension in part because "[a]ny defense" to the claims would involve terrorism "intelligence"); *Stanley*, 483 U.S. at 682 (noting "the prospect of compelled depositions and trial testimony by military officers" in concluding that special factors preclude *Bivens*' expansion to the military context).[6]

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[6] The availability of the state-secrets privilege does not substitute for such considerations. It may be that "courts can—with difficulty and resourcefulness—consider" that doctrine to protect state secrets "when there is an unflagging duty to exercise jurisdiction." *Arar*,

3. As the panel acknowledged, this case also has a "major immigration law component." Pet. App. 8a. That, too, is a special factor. "[A]ny policy toward aliens is * * * so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Immigration policy is replete with "foreign-policy objectives and * * * foreign-intelligence products and techniques." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-491 (1999). The implication of "immigration issues" further "'counsels hesitation' in extending *Bivens*" here. *Mirmehdi*, 689 F.3d at 982; see *De La Paz*, 786 F.3d at 375.

4. This case implicates a special factor of particular salience to lower-level officials assigned sensitive duties in the uncertainty that can follow a national emergency—the ability to rely on the chain of command and the expertise of coordinate agencies. The proper functioning of law enforcement, even in ordinary times, depends on subordinate officers following orders and policies issued by superiors. Cf. *United States* v. *Kisala*, 64 M.J. 50, 51-52 (C.A.A.F. 2006). Yet the decision below seeks to impose liability on local jailers because they did not disregard *terrorism* designations made by the *FBI*—an agency with far more information and experience in terrorism-related matters—in favor of their own putative assessments of prisoners' terrorism connections.

The very notion of chain of command cannot survive if lower-level officers must face the prospect of liability for

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585 F.3d at 575-576. But courts should not recognize a cause of action that will require them to do so unless "the legislative branch has authorized that course." *Lebron*, 670 F.3d at 554; see *Amr*, 585 F.3d at 576.

failing to countermand facially lawful orders from supervisors and designations by agencies with intelligence and expertise that the lower-level officials lack. If such a damages action is to be recognized, Congress and not the courts must create it. Cf. *Chappell*, 462 U.S. at 304 (refusing to recognize a *Bivens* action that would "disrupt[ ]" the "special relationship" between a "soldier [and] his superiors" (quotation marks omitted)).

Here, moreover, respondents deploy *Bivens* to challenge what they characterize as national-security "policy" promulgated by senior Executive Branch officials. *E.g.*, Pet. App. 255a(¶6); see *id.* at 244a. But "the *Bivens* remedy * * * ha[s] never [been] considered a proper vehicle for altering an entity's policy." *Malesko*, 534 U.S. at 74; see Ashcroft Pet., No. 15-1359, at 17-18. If suing senior Executive officials for promulgating policy is not a legitimate basis for a *Bivens* action, then suing lower-level officials for following that policy is not either.

5. Finally, the "[c]ongressional attention" to the constitutional violations alleged here has been "frequent and intense." *Schweiker*, 487 U.S. at 425. The Office of the Inspector General issued lengthy and detailed reports. Pet. App. 115a-117a (Raggi, J., dissenting); see J.A. 34-416. Yet "[a]t no point did Congress choose to extend * * * the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U.S. at 426. Congress's decision not to provide a remedy itself confirms that this Court should not imply one. *Id.* at 423; see *Lebron*, 670 F.3d at 551-552; *Vance*, 701 F.3d at 200-201.

II. Hasty And Sherman Are Entitled To Qualified Immunity

Federal officials are entitled to qualified immunity so long as "'their conduct does not violate clearly established statutory or constitutional rights.'" *Pearson* v.

Callahan, 555 U.S. 223, 231 (2009). The "clearly established" rights inquiry must account for the specific circumstances the officer confronted. "To be clearly established, a right must be sufficiently clear that '*every* "reasonable official would [have understood] that *what he is doing* violates that right."'" *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added). "[I]f officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

"[I]mmunity thus may be denied only if "'existing precedent * * * placed'" the answer "'beyond debate.'" *Reichle*, 132 S. Ct. at 2093. Although the inquiry is "objective"—subjective good faith is irrelevant, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)—qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments * * * . Properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). The decision below defies those standards.

A. The Complaint Does Not Plead Violations of Clearly Established Due-Process and Equal-Protection Rights

According to the Complaint, Hasty and Sherman violated respondents' due-process and equal-protection rights by keeping them in restrictive conditions. Pet. App. 49a-54a, 68a-73a. No one denies that *the FBI* had designated respondents as "of interest" to its 9/11 investigation. *Id.* at 16a-17a, 51a. Nor does anyone dispute that BOP policy mandated that all detainees so designated be housed in the "'most restrictive * * * conditions permitted.'" *Id.* at 50a-51a. The panel recognized that "national security concerns could justify detaining those

individuals with suspected ties to terrorism in these challenged conditions" for a whole "litany of reasons." *Id.* at 46a; see *id.* at 143a-144a. The panel thus agreed that Hasty and Sherman's execution of that policy itself "would not sustain liability." *Id.* at 51a.

1. The panel majority nonetheless held that Hasty and Sherman could be liable because, according to the Complaint, they became "'aware that the FBI had not developed any information'" tying respondents "'to terrorism.'" Pet. App. 51a. Hasty and Sherman, the panel presumed, were obligated to overrule the FBI's terrorism designations, and place respondents in less restrictive conditions, based on their amateur assessments of respondents' connection to the 9/11 investigation. *Id.* at 51a-52a.

Setting aside the implausibility of the Complaint's allegations—that local jailers had the information and expertise to "know" the FBI's terrorism designations were wrong—the allegations identify no violation of clearly established law. The panel cited no authority, and certainly no "clearly established law," declaring that local jailers are constitutionally obligated to reject FBI terrorism designations in favor of their own putative assessments. Looking at the "'particular conduct'" alleged, in the "'specific context'" in which Hasty and Sherman acted, *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015), the claim that the Constitution required them to defy BOP policy and FBI designations was hardly "'beyond debate.'" *Ibid.*

To the contrary, most "reasonably competent" prison officials would have believed they were *required* to respect the FBI's designations, whatever their own subjective beliefs. "[M]ade at BOP headquarters," the policy requiring "highly restrictive conditions" for anyone "of

interest" to the FBI's 9/11 terrorism investigation was facially constitutional. Pet. App. 31a, 50a-51a. And the determination that respondents were "of interest" to the FBI's investigation came from the FBI, the agency that has domestic and foreign intelligence information and was charged with running the investigation. Hasty and Sherman, by contrast, had no role in the 9/11 investigation. They had no expertise in terrorism matters. And they had no reason to receive all intelligence information the FBI might have.

Under those circumstances, the contention that "every reasonable official would have understood" that these jailers were constitutionally obligated to overrule the FBI's designations and the BOP's policy based on their own supposed subjective beliefs defies credulity. See *Reichle*, 132 S. Ct. at 2093.[7]

2. The Second Circuit reached the opposite conclusion only by changing the question. For the due-process claims relating to official conditions, it denied immunity because it was clearly established that "a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 58a. That framing of the inquiry contravenes this Court's repeated admonition "'not to define clearly established law at a high level of generality.'" *Mullenix*, 136 S. Ct. at 308. The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a

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[7] If anything, cases suggest the opposite. In *Brady* v. *Dill*, 187 F.3d 104 (1st Cir. 1999), for example, the court held that "subjective belief" in an arrestee's innocence "is generally insufficient to justify a police officer's unilateral release of a person who has been lawfully arrested pursuant to a valid judicial order." *Id.* at 113.

reasonable officer that *his conduct* was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). The panel's formulation excludes any consideration of the "situation"—the FBI terrorism designations and BOP-mandated policy in the wake of an unprecedented terrorist attack—that Hasty and Sherman "confronted."

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court held that qualified immunity may not be denied in a Fourth Amendment case simply because the right to be free from unreasonable searches is clearly established by the Fourth Amendment. *Id.* at 639. If the test were applied "at this level of generality," plaintiffs "would be able to convert the rule of qualified immunity * * * into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Ibid.* Consequently, this Court requires "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence relevant, sense." *Id.* at 640. The right's "contours" must have been so clear that any reasonably competent officer would have understood that his conduct was unlawful in the situation he confronted. *Ibid.*

The panel's contention that rights "do[ ] not vary with the surrounding circumstances," Pet. App. 49a, does not justify the contrary approach. However attractive that may sound in the abstract, whether conduct violates rights—and thus the rights' scope—*does* depend on circumstances. The right to be free from unreasonable searches in some sense may not "vary" with context. But whether a search is "unreasonable"—and thus violates the plaintiff's rights—*does* depend on circumstances. *Anderson*, 483 U.S. at 640-641. This Court thus evaluates immunity by addressing whether the challenged

conduct was obviously unlawful given the specific situation the officers confronted.[8]

The court of appeals repeated its error by asserting that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), made it "clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 58a. *Wolfish* merely states that legal principle as a "general proposition." *al-Kidd*, 563 U.S. at 742. Indeed, *Wolfish rejected* the constitutional challenges there (*e.g.*, that "double-bunking" inmates in the same cell violated due process). 441 U.S. at 541. It is anyone's guess how *Wolfish* "clearly establishes" that Hasty and Sherman were required to disregard the FBI's terrorism designations and substitute their own supposed beliefs.[9]

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[8] See, *e.g.*, *Mullenix*, 136 S. Ct. at 309 (addressing whether clearly established law prohibited shooting "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer"); *Wood* v. *Moss*, 134 S. Ct. 2056, 2068 (2014) (addressing whether clearly established law required "Secret Service agents engaged in crowd control * * * 'to ensure that groups with different viewpoints are at comparable locations at all times'").

[9] The panel also relied on the Second Circuit's earlier decision in *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd *sub nom. Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), as having "denied qualified immunity with respect to a materially identical conditions claim." Pet. App. 48a. But that earlier ruling suffers from the same defect as the decision below—it improperly concluded that the specific "context" was irrelevant. 490 F.3d at 169. The court's ruling, moreover, does not bind this Court. Whether the conduct here violated clearly established law is one of the questions this Court granted review to address. Pet. i, in No. 15-1363.

The panel majority's equal-protection analysis suffers from the same defect. The majority invoked a general standard: "[I]t was clearly established * * * that it was illegal to hold individuals in harsh conditions of confinement or otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. The panel never addressed whether any reasonable officer would understand that the actions Hasty and Sherman took—affording due respect to the FBI's terrorism designations when implementing the BOP's facially valid mandatory confinement policy—would violate that standard.

The answer to that question is "no." In *Iqbal*, this Court reviewed the FBI's "'arrest[ ] and det[ention] [of] thousands of Arab Muslim men'" in connection with its 9/11 investigation, as well as its policy of holding such detainees in "'highly restrictive conditions of confinement'" until cleared. 556 U.S. at 681. Because the attacks were "perpetrated by 19 Arab Muslim hijackers," the Court found it unsurprising "that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." *Id.* at 682. Such arrests were more likely motivated not by discriminatory bias, but rather by a "nondiscriminatory intent to detain" aliens "who had potential connections to those who committed terrorist acts." *Ibid.* The panel majority nowhere explained why every reasonable officer in Hasty and Sherman's circumstances would conclude otherwise with respect to the policies they were obligated to effect.

3. The panel did not suggest that Hasty and Sherman imposed the challenged conditions of their own volition based on "an express[ed] intent to punish." Pet.

App. 50a.[10] Nor could it: "[T]he decision to impose highly restrictive conditions was made" not by Hasty and Sherman, but "at BOP headquarters." *Ibid.* Instead, the fundamental premise of respondents' suit is that Hasty and Sherman became required—as a matter of clearly established law—to disregard the FBI's designations based on their own subjective assessments of respondents' terrorism connections. See *id.* at 51a-59a. No precedent supports that putative obligation. In fact, it is doubtful Hasty and Sherman even had that authority.

Neither Hasty nor Sherman were competent or authorized to decide whether detainees were "of interest" to the FBI's 9/11 investigation. Whether the detainees were "of interest" to the FBI's investigation was a matter for the FBI itself. Because the BOP's restrictive-condition requirements were facially valid, Pet. App. 31a, 50a-51a, Hasty and Sherman had no authority to disobey them either. It is well established that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." *Manual for Courts-Martial, United States* art. 90(c)(2)(a)(i) (2012). Likewise, this Court has explained that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional." *Michigan* v. *DeFillippo*, 443 U.S. 31, 37-38 (1979). "Society

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[10] In *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466 (2015), this Court explained that *Wolfish* divides cases into two categories—those with "an expressed intent to punish" and those without. *Wolfish* "explain[ed] that, in the absence of an expressed intent to punish," pretrial detention conditions violate the Constitution if they are "not 'rationally related to a legitimate non-punitive governmental purpose.'" *Id.* at 2473-2474. The latter test is "solely an objective one." *Id.* at 2473; see *ibid.* (*Wolfish* applied "rationally related" standard without considering "the prison officials' subjective beliefs about the policy").

would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Ibid.*

So too here. Hasty and Sherman were "charged" with implementing BOP policy based on the FBI's terrorism determinations. It is an understatement to say "[s]ociety would be ill-served" if corrections officers took it upon themselves to second-guess our intelligence agencies in assessing terrorism-related risks. Indeed, as explained below, experience has taught that underestimating such risks can be calamitous. See p. 42 & n.12, *infra*.

Consequently, even using *Wolfish*'s general formulation, Hasty and Sherman's conduct was not clearly unlawful. Following a facially valid BOP confinement policy in view of terrorism designations provided by the FBI has a "legitimate nonpunitive governmental purpose." *Wolfish*, 441 U.S. at 561. It ensures terrorism assessments are made by those with expertise, information, and authority, and that jailers without experience in such matters do not jeopardize security based on their own untutored views. No clearly established law compels the contrary conclusion.[11]

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[11] Even if Hasty and Sherman's supposed belief that the FBI's terrorism designations were wrong were taken to suggest they had improper motives, but see pp. 39-40 & n.10, *supra*, that would not render *compliance* with facially valid orders clearly unconstitutional. See *al-Kidd*, 563 U.S. at 744 ("We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.").

B. The Complaint Does Not Plead Clearly Established Fourth Amendment Violations

The Fourth Amendment strip-search claims fare no better. Denying qualified immunity, the panel declared "'it was clearly established'" that "'strip and body-cavity searches [must] be rationally related to legitimate government purposes.'" Pet. App. 79a. The challenged policy was clearly unlawful, the panel held, because it required strip searches "when there was no possibility that [respondents] could have obtained contraband." *Id.* at 77a. That analysis, however, again fails to examine whether the policy was clearly unlawful in the circumstances Hasty and Sherman confronted.

Experience in similar circumstances had taught that failure to exercise extreme diligence can have devastating consequences. A few years before the events here, a "restrictively confined terrorist" attacked a prison guard, stabbing him in the eye with a knife fashioned from a contraband comb—with tragic consequences. Pet. App. 143a, 161a (discussing *United States* v. *Salim*, 690 F.3d 115 (2d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)).[12] As Judge Raggi explained in dissent, "it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another to ensure prison security." Pet. App. 161a.

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[12] After being attacked by a suspected al Qaeda member, the guard "suffered brain damage that left his right side partially paralyzed and interfered with other normal functions, including his ability to speak and write." *Salim*, 690 F.3d at 120.

Even if the contrary view were law, that law was not clearly established—a fact underscored by Judge Raggi's disagreement with the panel majority on whether such searches violate the Fourth Amendment. "If judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).[13]

C. Respondents' Allegations Do Not Plead a Clear Violation of § 1985(3)

Hasty and Sherman are entitled to immunity with respect to the § 1985(3) claim as well.

1. Section 1985(3) makes it unlawful for "two or more persons" to "conspire * * * for the purpose of depriving * * * any person or class of persons of the equal protection of the laws." For the reasons above, pp. 34-40, *supra*, the conduct challenged here did not violate respondents' clearly established equal-protection rights. A conspiracy to engage in that conduct thus would not amount to a clearly established violation of § 1985(3).

The Complaint also fails to allege a clearly established violation of § 1985(3) for two additional reasons. First, in 2001, it was unclear whether § 1985(3) even applied to federal officers. See Pet. App. 82a-83a; *Hasty*, 490 F.3d

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[13] The panel majority stated it was "bound" to deny qualified immunity because it had denied qualified immunity in *Hasty*, which it characterized as involving "substantially the same" Fourth Amendment claim. Pet. App. 79a. That prior ruling does not bind this Court, and its analysis features the defects identified above. See p. 38 n.9, *supra*. *Hasty*, moreover, emphasized allegations of *successive* strip searches. See 490 F.3d at 172. Here, respondents allege searches only after *intervening* events like movement between cells. Pet. App. 160a-161a.

at 176. Thus, when Hasty and Sherman acted, it could not have been clear to every reasonable officer that the alleged conspiracy would violate § 1985(3).

Second, under the intra-corporate (or intra-enterprise) conspiracy doctrine, a corporation's "employees, when acting within the scope of their employment, cannot conspire among themselves." *McAndrew* v. *Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (en banc); Pet. App. 82a. Here, the Complaint alleges a conspiracy among the DOJ Defendants and Hasty and Sherman. Pet. App. 347a (¶305). But the DOJ Defendants, Hasty, and Sherman all work for a single unit of government—the DOJ includes BOP and its employees. *Id.* at 82a-83a & n.46. For that reason, at least one district court has ruled that the Attorney General and BOP employees "cannot conspire together under Section 1985." *Id.* at 83a n.46. The panel majority thus admitted that it was far from clear whether the alleged conduct violated § 1985(3). It remanded for a determination whether DOJ and BOP should be considered a single enterprise. *Id.* at 83a. That remand demonstrates why immunity must be granted: It was not clear to the Second Circuit whether the alleged conduct amounted to a "conspiracy" proscribed by § 1985(3). *A fortiori*, it would not have been clear to "any reasonably competent officer."

2. Rather than require an unmistakable violation of § 1985(3), the panel denied immunity because it thought the conduct was clearly proscribed by other sources of law. In *Hasty*, the Second Circuit had denied immunity under § 1985(3) on the ground that "'[t]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established.'" *Hasty*, 490 F.3d at 177. Citing *Hasty*, the panel majority here declared that "'federal officials could not reasonably have believed that it was

legally permissible for them to conspire with other federal officials'" even "'without a definitive ruling from this Court on the application of section 1985(3).'" Pet. App. 83a.

That theory defies this Court's precedents. The "clearly established law" inquiry must be made *solely* by reference to the right the defendant was accused of violating. *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984). In *Davis*, a state employee brought due-process and § 1983 claims alleging that he was discharged without appropriate process. *Id.* at 187. The terminated employee urged that qualified immunity should be denied because the defendants' conduct clearly violated a state regulation. *Id.* at 193-194. This Court disagreed, holding that "[o]fficials sued for violations of rights conferred by a statute or regulation * * * do not forfeit their immunity by violating some *other*" right. *Id.* at 194 n.12 (emphasis added). Those "officials become liable for damages only to the extent that there is a clear violation of the statutory rights *that give rise to the cause of action for damages*." *Ibid.* (emphasis added). Even if the defendants clearly violated a state regulation, they were entitled to immunity on the due-process and § 1983 claims because *those* provisions did not clearly prohibit the conduct. *Id.* at 194-195 & n.12.

The Court reiterated that holding in *Elder* v. *Holloway*, 510 U.S. 510 (1994). The question presented there was: "Is qualified immunity defeated where a defendant violates *any* clearly established duty," or "must the clearly established right be the federal right on which the claim for relief is based?" *Id.* at 515. The Court concluded that *Davis* "held the latter." *Ibid.* Here, the "claim for relief is based" on a putative violation of

§ 1985(3). Unless Hasty and Sherman clearly violated that provision, they are entitled to immunity.

III. The Allegations Do Not Meet *Iqbal*'s Plausibility Requirement

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Iqbal*, 556 U.S. at 678 (emphasis added) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). It does not suffice to "plead facts * * * 'merely consistent with' * * * liability." *Ibid.* The allegations must eliminate "'obvious alternative'" and "more likely" lawful explanations for the challenged conduct. *Id.* at 682. The Complaint does not meet that standard here.

A. The Complaint Does Not Plead Plausible Due-Process or Equal-Protection Claims Based on "Official" Conditions

In *Iqbal*, this Court reversed the Second Circuit's conclusion that the plaintiffs had plausibly alleged that the FBI detained "'thousands of Arab Muslim men'" in the wake of 9/11 with discriminatory intent. 556 U.S. at 681. The allegations failed to dispel the "'obvious alternative explanation'"—that the arrests were made with the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682. Given the origins of the 9/11 attackers, it was "unsurprising" that so many detainees would be Arab or Muslim. *Ibid.* Given that alternative explanation, "the purposeful, invidious discrimination" the plaintiffs asked the Court to infer was "not a plausible conclusion." *Ibid.*

Respondents' "official conditions" due-process and equal-protection claims fail for the same reason. Respondents theorize that Hasty and Sherman detained them in highly restrictive conditions without a "legitimate nonpunitive penological purpose" in violation of due process, or based on discriminatory animus in violation of equal protection. But the Complaint fails to overcome the obvious alternative explanation—that Hasty and Sherman were complying with the FBI's terrorism designations and BOP policies.

1. The panel did not dispute that the BOP policy—which required all detainees "of interest" to the FBI's terrorism investigation be housed in the most restrictive conditions permissible—served compelling purposes. It agreed that "national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions" for a whole "litany of reasons." Pet. App. 46a. And the panel did not dispute that respondents were designated "of interest" by the FBI. *Id.* at 18a, 51a.

That designation provides the most "obvious" reason for respondents' detention in restrictive conditions. It was not discriminatory or arbitrary. Rather, the FBI provided terrorism designations and, cognizant of the FBI's expertise and authority, Hasty and Sherman followed them. As the OIG report observed, "the BOP accepted [the FBI's] assessment, since the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism." J.A. 241. Even the panel majority accepted that "Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism." Pet. App. 52a.

The panel held that the Complaint overcame that alternative explanation by alleging that Hasty and Sherman "*eventually* knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 52a (emphasis added). Absent "individualized suspicion" of terrorism ties, "the restriction[s] or condition[s] * * * were 'arbitrary or purposeless.'" *Id.* at 45a-46a; see also *id.* at 50a-51a. But that theory does not even approach the "plausibility" threshold.

First, even assuming that Hasty and Sherman somehow came to "know" that the FBI's terrorism designations were wrong, that still does not overcome the most plausible reason for confining respondents in restrictive conditions: Whatever Hasty's and Sherman's personal beliefs, they deferred to the FBI's determinations in view of that agency's expertise, experience, and authority. The FBI, not the local jailers, has experience with national-security and terrorism matters. The FBI, not the local jailers, was conducting the 9/11 investigation. The FBI, not the local jailers, was charged with "identifying the terrorists who hijacked the airplanes and anyone who aided their efforts." J.A. 43. Indeed, Hasty and Sherman likely had no authority to overrule FBI designations or BOP policy dictating the confinement conditions to be imposed as a result. It is not plausible to infer "purposeful, invidious discrimination," *Iqbal*, 556 U.S. at 682, or arbitrarily punitive conditions, *Wolfish*, 441 U.S. at 538-539, from obedience to FBI determinations and binding policy from "BOP headquarters," Pet. App. 50a—even if one assumes Hasty and Sherman disagreed.

Second, the allegation that Hasty and Sherman "knew" respondents had no terrorism connections—and thus should not have been "of interest" to the FBI's

investigation—defies plausibility as well. Pet. App. 52a. According to the Complaint and the panel, Hasty and Sherman supposedly came to know that respondents had no terrorism connections because the MDC received "regular written updates" explaining why each detainee was arrested, as well as "'evidence relevant to the danger'" each detainee "'might pose' to the MDC." *Ibid.* According to the Complaint, those "updates often lacked any indication of a suspicion of a tie to terrorism." *Ibid.*

But the Complaint offers no reason why Hasty and Sherman would believe the FBI was sending, into a prison, "written updates" with *all* the potentially sensitive domestic and foreign intelligence information it was obtaining about detainees. The Complaint, moreover, alleges that the updates contained only "'evidence relevant to the danger [the detainees] might pose' *to the MDC*," Pet. App. 52a (emphasis added)—not all information intelligence agencies had gathered connecting detainees to terrorism. The allegation that Hasty and Sherman thereby *knew* the FBI had no individualized suspicion does not register as "'conceivable,'" much less cross "'the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 680.

2. Nor can the panel's alternative "mendacity" theory push the allegations across that line. Pet. App. 68a. Departing from the district court, the panel inferred discriminatory intent from an unspecified memorandum, with an unstated date and purpose, that supposedly contained the false statement that MDC "executive staff * * * had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment." *Id.* at 68a-69a (quotation marks omitted); see *id.* at 53a. According to the panel, that was false because neither Hasty nor Sherman had conducted such an assessment. *Id.*

at 68a-69a. "[I]t is reasonable to infer," the panel declared, "that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU" arbitrarily or "based on discriminatory intent." *Id.* at 69a.

As Judge Raggi pointed out, the panel's novel theory fails to account for the "obvious[] and more likely" explanation—that, in suggesting individualized assessments had been conducted, MDC officials were properly "rel[ying] on the FBI's designations." Pet. App. 157a. As the OIG report observed, "the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism." J.A. 241. The cited document itself makes that clear.[14] It does *not* state that *MDC staff* "classified the 'suspected terrorists' as 'High Security.'" Pet. App. 279a (¶ 74). It says MDC staff "determined" that the detainees "*have been* classified"—presumably by the FBI—"as 'High Security' inmates." Hasty Pet. App., No. 15-1363, at 467a (emphasis added). The cited memorandum, moreover, was developed "to provide staff with consistent guidelines and procedures" in handling "suspected terrorism inmates" before they arrived: It is dated *three days* after the 9/11 attacks, *before* any respondent arrived at MDC.[15] It is not plaus-

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[14] The document is cited by and thus incorporated by reference in the Complaint. See 2 Moore's Federal Practice § 12.34[2] & n.35 (3d ed. 2015); *Brass* v. *Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (court may consider document "in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit").

[15] The memorandum is dated September 14, 2001. Hasty Pet. App., No. 15-1363, at 466a. The earliest any respondent was arrested or transported to the MDC is September 16, 2001. See Pet. App. 302a (¶ 142) (Abbasi); *id.* at 306a (¶¶ 157-158) (Mehmood); *id.* at

ible that a document dated *before* the detainees' arrival was intended to convey that Hasty and Sherman had personally made individualized determinations for unknown detainees.

The panel refused to accept the "obvious" and "likely" explanation that the memorandum was referring to the FBI's designations. That explanation, it asserted, was "belie[d]" by the Complaint's "alleg[ations] that the 'MDC Defendants were aware that the FBI had not developed *any information*' to tie the 9/11 detainees to terrorism." Pet. App. 70a. That makes no sense. The panel elsewhere acknowledged that Hasty and Sherman may have "*initially*" believed the designations lawful, and only "*eventually* knew that the FBI lacked any individualized suspicion for many of the detainees." *Id.* at 52a (second emphasis added). The panel nowhere suggested that Hasty and Sherman had already come to believe the FBI's designations were unfounded when the cited document was created, before any respondent arrived at MDC.

Far from supporting a "plausible" inference that Hasty and Sherman imposed the restrictive conditions of confinement with discriminatory intent, the document shows the opposite. It admonishes MDC staff to "perform their assigned duties in a professional manner" and prohibits "humiliat[ing] and provok[ing]" the detainees. Hasty Pet. App., No. 15-1363, at 466a ("Professionalism must be demonstrated at all times * * * ."). Because the allegations fail to refute the "obvious alternative" and lawful explanation for the official confinement conditions,

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311a (¶ 174) (Benatta); *id.* at 318a-319a (¶¶ 196-198) (Khalifa); *id.* at 324a (¶ 217) (Hammouda); *id.* at 328a (¶¶ 230-232) (Bajracharya).

the due-process and equal-protection claims—as well as the § 1985(3) claims—must fail. *Iqbal*, 556 U.S. at 682; see *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (requiring "racial, or perhaps otherwise class-based, invidiously discriminatory animus" under § 1985(3)).

B. Respondents Do Not Allege Plausible Fourth Amendment Claims

Respondents' allegation that "they were subject to unreasonable * * * strip searches" under an unwritten policy, Pet. App. 75a, fails *Iqbal*'s requirements as well.

1. The Complaint fails to plausibly allege Hasty's and Sherman's personal involvement. It avers that Hasty ordered other MDC officials to "design extremely restrictive *conditions of confinement*," and that the *confinement conditions* were "approved and implemented by Hasty and Sherman." Pet. App. 279a (¶ 75) (emphasis added). From that, the panel inferred that Hasty and Sherman *also* ordered and approved an *unwritten* "strip search policy." *Id.* at 76a. That, however, is just speculation. The supposed "policy" was "never put in writing." *Id.* at 292a (¶ 112). The Complaint offers no facts showing that Hasty and Sherman somehow reviewed or approved that unwritten policy.

The panel inferred the supposed "policy" from the treatment respondents allegedly received. See Pet. App. 76a-78a. Respondents claim that they were strip searched upon arrival at the MDC, after being transported to the ADMAX SHU, and "every time they were removed from or returned from their cell," including for lawyer visits, medical care, attending court hearings, or "being transferred to another cell." *Id.* at 292a (¶ 111). But there is no allegation that Hasty or Sherman was involved in or observed those searches, or that those

searches occurred pursuant to the policy Hasty or Sherman allegedly approved.[16]

2. In any event, the Complaint cites no facts suggesting Hasty or Sherman was aware of a strip-search policy not "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). The no-reasonable-relationship requirement is met only when the "logical connection between the [policy] and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Here, the "policy" alleged in the Complaint had a "logical connection" to prison security concerns—the searches were conducted after events involving prisoner movements and visits. See p. 42, *supra*. The panel asserted that respondents were "strip searched when there was no possibility that they could have obtained contraband." Pet. App. 77a. But, as Judge Raggi noted, the judgment whether respondents could obtain contraband when being transferred in and out of their cells and meeting with others "is precisely the sort of 'difficult judgment[ ] concerning institutional operations' that [this] Court has concluded must be made by 'prison administrators.'" *Id.* at 161a (quoting *Safley*, 482 U.S. at 89).

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[16] The Complaint's allegation that searches "were documented in a 'visual search log' * * * *for review* by MDC management" cannot fill the gap. Pet. App. 293a (¶ 114) (emphasis added); see *id.* at 77a. The contents of the search log are undescribed; the Complaint does not suggest it contains details that make abuse obvious, or that they reveal a pattern showing abuse. Even if one assumes Hasty and Sherman reviewed the logs, that does not give rise to a plausible conclusion that they, through their "own individual actions," sanctioned the practices complained of. *Iqbal*, 556 U.S. at 676.

In the aftermath of 9/11, and in light of serious attacks by other terrorism detainees held under restrictive conditions, see p. 42 & n.12, *supra*, the unlawfulness of even an aggressive strip-search policy for designated detainees is hardly apparent. It is not plausible that Hasty and Sherman not only were personally involved in the strip searches but knew they were so "irrational" as to lack a "reasonabl[e] relat[ionship] to legitimate penological interests." *Safley*, 482 U.S. at 89.

C. The Complaint Does Not Plausibly Allege Hasty's Liability for the "Unofficial" Conditions

It is now settled that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676. Instead, plaintiffs must plead that each official violated the Constitution "through [his] own individual actions." *Ibid.* Supervisors are not liable for their subordinates' misconduct unless they "knew of, and disregarded" instances of abuse so serious and unaddressed or attended to by other means that it was incumbent on them to intervene. *Walker* v. *Schultz*, 717 F.3d 119, 125, 129 (2d Cir. 2013); see *Iqbal*, 556 U.S. at 676-677. The supervisor *must* have known of both the serious conditions and the circumstances that required the supervisor's intervention to prevent harm.

In this case, the Complaint alleges a range of unauthorized abuses by line-level correctional officers. That conduct does not reflect this Nation's (or Hasty's and Sherman's) values. But the Complaint fails to plausibly allege that Hasty or Sherman was responsible for that conduct. They are not alleged to have engaged in it themselves. Nor does the Complaint identify any instance where they witnessed those abuses. As the OIG report concluded, none of the abuse "was engaged in or

condoned by anyone other than the correctional officers who committed it." J.A. 299 n.130. And indeed, the panel found no plausible claim against Sherman. While the Complaint averred that "Sherman made rounds on the ADMAX SHU and was aware of conditions there," Pet. App. 260a(¶26), those "general and conclusory" allegations "lack[ed] a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue." *Id.* at 57a.

The panel nonetheless upheld similar claims against Sherman's own supervisor, Hasty. See Pet. App. 56a-57a. Its analysis, however, was perfunctory at best. It consisted of a four-sentence paragraph that merely listed the allegations seriatim. *Iqbal*, however, requires analysis of the Complaint's plausibility—including the plausibility of the conclusions in light of other conceded allegations in the Complaint—not a mere recitation of allegations.

While the Complaint alleges generally that Hasty was made aware of abuse, Pet. App. 260a(¶24), it makes no allegation that any subordinate, anyone at BOP, or anyone at OIG informed Hasty of any guard misconduct, or, more properly, of misconduct that required his intervention because it was not being properly addressed by the ordinary mechanisms for redress within the prison. The panel primarily invoked "allegations that Hasty avoided evidence of detainee abuse by '*neglecting* to make rounds.'" *Id.* at 56a (quoting *id.* at 260a(¶24)) (emphasis added). Even assuming that allegation is true, the panel ignored the "obvious alternative explanation." *Iqbal*, 556 U.S. at 682. As Warden, Hasty oversaw an enormous facility. Consequently, before any 9/11 detainee arrived, Hasty had delegated primary "responsibility for supervising all MDC correctional officers, including those who

worked on the ADMAX," to the Captain of the MDC. Pet. App. 261a(¶27); see J.A. 232. The "Captain" was "the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU." J.A. 230 n.95. Beneath him, the "SHU Lieutenant [wa]s directly responsible for supervision of the staff members assigned to the [ADMAX] unit." Hasty Pet. App., No. 15-1363, at 467a. That hierarchy explains any administrative distance between Hasty and daily events at the ADMAX SHU. Necessary delegation of authority and reliance on subordinates provides a far "more likely" explanation for any failure to make rounds. *Iqbal*, 556 U.S. at 682.

The panel suggested that certain paragraphs of the Complaint "detail[ ]" Hasty's awareness of abuse. Pet. App. 56a-57a. But no "detail" is provided, and even the generalized assertions fail to overcome "obvious" lawful explanations. For example, the panel identified allegations that "Hasty made it difficult for detainees to file complaints." *Ibid.* But the allegations do not suggest how Hasty was involved in those difficulties. In fact, the difficulty identified in both the Complaint and the OIG report had nothing to do with Hasty. From the time the ADMAX SHU was established, MDC had an organized system for registering and addressing prisoner complaints that was set forth in a manual to be given to prisoners. J.A. 239-240, 276-278. The impediment to filing complaints was the failure of some guards to provide, or to allow detainees to keep, those manuals. Pet. App. 301a(¶140); J.A. 276-278, 299-300. There is no allegation that Hasty ordered, knew of, or was involved with, that mistake.

The panel also invoked an allegation that staff members who reported abuse were called "snitches." Pet.

App. 55a. But the Complaint does not say Hasty used that term, or even that he knew others did. Pet. App. 281a (¶78).

And finally, the panel embraced the theory that Hasty's knowledge of serious abuse could be inferred because the abuses were so "pervasive" that video cameras were installed in cells and hallways. Pet. App. 57a. But the initial directive to put video monitors in cells issued within two days of 9/11, *before* respondents arrived and any abuse could have occurred. J.A. 279 & n.126. And any enhancements to the videotaping efforts reflect an "affirmative step[ ]" by "MDC management * * * to *prevent* potential staff abuse." *Id.* at 300 (emphasis added); see *id.* at 279-280.

The panel's opinion illustrates precisely how *Iqbal*'s "plausibility" analysis should *not* be applied.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2016